No. 3516

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,
Appellant,

vs.

CHAN WY SHEUNG,
Appellee.

BRIEF FOR APPELLEE.

JOSEPH P. FALLON,
Attorney for Appellee.

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The opening statement of the case by the appellant is substantially correct, to wit: That the appellee is the son of Chan Young. That the citizenship of Chan Young has been conceded by the Department of Labor on three prior occasions. These prior adjudications are now set aside and the citizenship of the father, Chan Young, is denied and the son is ordered deported.

The points raised by the Department of Labor in rendering this adverse decision are based upon two certificates executed over twenty years ago. The points are as follows:

First. Whether the father in this case, Chan Young, is the same man who signed a certificate of registration in Victoria, B. C., an exhibit in this case;

Second. Whether the facts stated in said certificate are true and conclusive as to the place of birth of the father; and

Third. Whether the grandfather made a statement that he came to the United States in 1876, which, if true, would preclude the possibility of the birth of his son, the father of the appellee, in the United States.

As to the first point, the facts are that the man in said certificate arrived in Victoria, B. C., SS. Umatilla June 2, 1899, and the Canton records state that it is their belief that this man arrived on said steamer to Victoria via San Francisco. A search was made upon the records at San Francisco to determine whether this was the case. The San Francisco records show that one Chun Wan Mong, which name corresponds with the name of the man in said certificate, arived at San Francisco on the SS. Gaelic May 22, 1899, and departed on the SS. Walla Walla May 26. Chinese transits for Victoria departed on the Umatilla May 30, 1899, and the manifest of the SS. China May 29, 1899, shows that 44 transits for Vancouver departed on the SS. Umatilla May 31, 1899. Further, the manifest of the SS. Peking May 8, 1899, shows that one Chan Wong, age 48, departed on the Umatilla May 16, 1899, for Victoria.

The evidence in this case taken in 1899 shows by the testimony of all witnesses that the father went from China to Victoria, B. C., the second or third month of the year 1899, but there is nothing to indicate that he came by way of San Francisco, and as the records of the San Francisco and Victoria offices disagree as to the steamer he departed on from San Francisco, we are certainly in a quandary as to whether he came direct to Victoria by way of San Francisco or by some other port, or direct. Therefore in order to determine that the man named in the certificate is the same man, it is necessary to presume that the records of the San Francisco office are incorrect. But what right have we to assume that the records of this office are incorrect any more than we have a right to assume that the records of the Victoria office are incorrect? Why would it not be just as fair to assume that, although the man named in the certificate did arrive June 2nd by way of the Umatilla, the Victoria records were in error in not showing that the Chun Wan Mong named by the San Francisco office as the party on the Walla Walla failed to arrive by said steamer in Victoria. The father might have been the man named as departing on the Walla Walla and the Victoria office been in error in not noting his name on their manifests, and there might have been two men departing on the Walla Walla, one named Chun Won Mong and the other named Chin Way Mong, the man named in the certificate. There is evidence in this identical case of two Chinamen

having the same name. For instance, you will note that the manifest of the steamship City of Peking shows one Chan Wong in transit for Victoria by way of Umatilla May 16, 1899. It is manifest and clear therefore that it is necessary to resort to presumption in this case to determine whether the father is the same person as named in the certificate, and for reasons hereafter to be cited it is submitted that it is not fair at this late date under the circumstances of this case to resort to any presumption.

Further attention is called to the fact that the certificate in question shows that the last place of residence of the man who signed the same was Hong Kong, China, but the testimony taken in 1899 fails to disclose the fact that the father in this case was ever in business or ever domiciled in Hong Kong. The testimony of the father, as well as his father, shows that after the father completed his schooling in the home village, he then went into business in a store in the Nom How village, and that he was in that store for some time until the store burned. Further, in the testimony of the father in the old case, he produces a laborer's card No. 3120 which he had received from the Victoria office, but it will be noted that the number of this card fails to correspond with the number of the certificate in question, which would also tend to show that the father is not the man who signed that certificate.

Further, your attention is called to the statements on the reverse of this certificate, giving a description of the man, as having a pitted face, scar on right jaw and scar on left eyelid. A photograph of the father may be seen in the case of his prior landed son, Chan Way Bon No. 10375-115, but there appears to be nothing whatever in this photograph to answer to the above description, which would seem to be conclusive evidence that the father is not the man named in said certificate; and right here it is in order to state that this fact brings out more than any other the unfairness of questioning the citizenship of the father at this time. The records show that the father is dead and therefore there is no way to determine definitely except by the photograph above mentioned, that the father does not answer the description heretofore given. If he were alive it would be an easy matter to determine whether he answered this description, but the Department waits until he is dead, after recognizing his citizenship in three instances, to raise this question. It is certainly highly unfair.

Your attention is further invited to the signature on the certificate, and the signature of the father on the affidavit in the case of his prior landed son Chan Way Bon No. 10375-115. I submit that there is no more similarity between these signatures than between my signature and either of them. It does not require an expert, but a layman can see that there is no similarity in the handwriting of the men who signed these two papers referred to.

Further, your attention is called to the fact that the testimony in 1899 shows by all witnesses that the father came into Victoria in the second or third month, which at the latest would be the month of April, and which of course does not correspond with the date of the arrival of the man named in the certificate.

It is submitted that all of the above circumstances and facts not only throw serious doubt as to the identity in question, but are facts far more convincing of the lack of identity than the other points mentioned by appellant are of identity. But certainly, to say the least, all of these facts destroy any ground for holding that the identity is reasonably established.

The second point is whether even if the identity is established, the facts stated in this certificate can be taken as conclusive evidence of the place of the birth of the father. In taking up this point there is just one question that we would like to put first of all to appellant. Would the Department of Labor, in the absence of any other evidence, take a similar certificate as sufficient to establish the birthplace of a Chinaman? Never in the world. As a rule in deciding a case upon circumstantial evidence, the Court resorts to some motive, but where is the motive here? What object would this man have in stating in signing the certificate that he was born in China when he was intending to apply for admission on the ground of citizenship in this country? We have already shown that the

certificate is in error in one respect, viz, the last place of residence, and if it is in error in one respect, why could it not be in this? If the certificate was signed by the father in this case, it is very manifest that he understood that he was merely giving the place from which he had come and not the place of his birth, and here again we are confronted with difficulty, because the man is now dead; we cannot ask him any questions; we cannot call in any witness who might have been present when he signed the certificate, because he, being dead, cannot give us the names of such witnesses.

Further, your attention is called to the fact that the certificates are the only evidence in this case, if we can consider them evidence, because it is not in the form of testimony sworn to that the father was born in China. We have the sworn testimony of the father when he was landed in this country and when one of his prior sons was admitted, exactly where he was born in this country and we also have the testimony of the father of his father as to whether he was born in this country and also the testimony of a witness who was working for the father's father at the time and who testified of his birth in this country. And in addition we have the death certificate filed in this case in 1912, six years before the present question was raised, signed by a disinterested witness, setting forth the fact that the father was born in this country, and it is submitted that this evidence is certainly stronger than the certificates which, without any

direct evidence of their authenticity, are not admissible as evidence by the rules of the law of evidence, especially under all the circumstances of this case, and we repeat and insist that it is highly unfair and unjust to hold that these certificates even if under the circumstances herein mentioned should be sufficient to rebut all of the real evidence and the sworn testimony above mentioned, and to cause the Department to reverse its decision three times made on the question of citizenship.

At the time the applicant in this case sailed for this country he knew, as the Department had held in three instances, that his father was a citizen of this country, and it seems to us that it is highly unfair for the Government to hold out this fact as true, thus inducing this man to go to the expense of coming to this country and, after he arrives here, inform him that they have now made investigations and that their former decisions were incorrect, in spite of the fact that the Department has had twenty years to make the same investigation and could have obtained the same information that they now have twenty years ago.

The next point raised is that the grandfather's registration certificate sets forth that he came to the United States in 1876. When one considers the methods employed at the time of the registration it might easily be concluded that a mistake was made. A Chinese in registering would state the time of his arrival in the Chinese language and the

same would be translated into English by either an interpreter or the registration clerk, and in translating the Chinese calendar the greatest care must be taken. In the case of Quan Hing Sun this Court has held "That it must distinctly appear that the Department was not influenced in its decisions by any considerations unauthorized by law", and cites a number of cases to that effect.

Ex parte Quan Hing Sun, 254 Fed. 402.

It is a plain rule of law that no decision of any Court once rendered can be reopened upon newly discovered evidence if that evidence could by reasonable diligence have been discovered before said decision was rendered, and especially is that true when the main witness in the case has since died. Further, no Court would under any circumstances or upon the discovery of any evidence allow a decision to be opened up twenty years after it was rendered. As the new evidence now relied upon in this case could have been discovered twenty years ago with reasonable diligence and the man against whom it is offered is dead there is no authority in law for admitting such evidence and the decision of the Department influenced by the consideration of such evidence would be a decision influenced by considerations unauthorized by law.

Further, said certificates are inadmissible in accordance with the rules of law for the reason that there is no proof offered in this case to show that they were signed by the father. The Department

has not produced a single witness to prove that the man signed these certificates or even that the man whose name appears upon it signed it. Before these certificates would be admissible in any Court it would be necessary to prove the signature by witness, not by presumption. The law will admit no instrument in writing as evidence on presumption, but the signature must be proved before it is admitted as evidence.

Wright v. Taylor, 30 Fed. Cases 18,096;
Richmond etc. R. C. v. Jones, 72 Ala. 218;
Lane v. Farmer, 13 Ark. 63;
Wharton on Evidence, 2nd Ed., Sec. 689.

Not only has the Department failed to prove the signature as required by law or to prove the authenticity of the certificates, but on the other hand there are a number of facts as hereinbefore pointed out, such as comparison of the signature on this certificate with the father's signature on the affidavit in his son's case, supra, and the absence of any of the distinguishing marks mentioned in the certificates on the father's photograph, etc., which are convincing evidence to the contrary. As it is plain therefore that said certificates are inadmissible by the rules of law to prove the facts stated on their face, it is plain a decision of the Department based upon the consideration of such certificates as proper evidence would be influenced by considerations unauthorized by law and it is submitted therefore that the Department cannot consider said certificates as evidence. In the case of Owe Sam Goon, 235 Fed. 654, this Court said:

> "The rule of law respecting evidence demands of a party seeking to establish a fact that he produce the best evidence available to him. Greenleaf on Evidence (16 Ed.), Sec. 81; Wigmore on Evidence, Sec. 1173; Jones on Evidence, Vol. 2, Sec. 212. And this is the identical rule prescribed by the Department of Labor for the examination of the case of an alien charged with being subject to arrest and deportation under the Immigration Act. Of course, this means that the best evidence must be proper evidence. Jones on Evidence, supra; Ex parte Owe Sam Goon, 235 Fed. 654."

The Bureau seems to proceed upon the theory that these Chinese cases may be decided upon evidence inadmissible according to the rules of law, but it is plain, as in the case of Quan Hing Sun, supra, that the Department must not be influenced in its decisions by considerations *unauthorized by law* and it is submitted therefore that as said certificates are inadmissible under the rules of law there is no new evidence in this case and the applicant is entitled to land. The Department of Labor has held that the rules of evidence must be considered as illustrated by the fact that it has repeatedly held that hearsay evidence is inadmissible. In the case of Owe Sam Goon, supra, this Court further says:

> "As has been repeatedly stated, it is not our function to weigh the evidence in this class of cases, but we may properly consider the jurisdictional question of law, whether there was evidence to sustain the conclusion that the accused was in the United States in violation of law and subject to deportation under Section 21 of the Immigration Act. In the absence

of the best evidence to sustain the same, we may also conclude that the order of deportation was arbitrary and unfair, and subject to judicial review."

United States v. Jue Toy, 198 U. S. 253, 260;
25 Sup. Ct. 644, 40 L. Ed. 1140;
Chin Yow v. United States, 208 U. S. 8, 12, 28;
Sup. Ct. 201, 52 L. Ed. 369;
In re Chan Kam, 232 Fed. 855, 857 and cases cited therein.

If the father were alive and arrested, charged with being in or seeking re-entry from abroad entitled to have his right determined by a judicial inquiry with all its assurances and sanctions, and the strict rules of law would obtain. I invite the Court's attention on this point to the recent decision of the United States Supreme Court in the case of Edward White v. Chin Fong, 40 Supreme Court Advance Opinions, June 15, 1920. The Court said:

"But this overlooks the difference in the security of judicial over administrative action, to which we have adverted, and which this Court has declared, and in the present case, the right that had been adjudged, and had been exercised upon the adjudication."

If this be true in the father's case, it applies with equal force to that of the son when the only evidence adduced is that which could be invoked against the father if he were alive and when the son's claim is based upon the right that had been

adjudged and had been exercised in reliance upon the adjudications.

But besides the applicant's legal rights to land in this case, common plain justice should entitle him to land. The applicant's father is dead. The Department has held three times that the father was a citizen of the United States. It has been twenty years since the Department decided upon the citizenship of the father, and the Department by not revising said decision induced this applicant to go to the expense of coming to this country, notwithstanding the fact that the Department could by reasonable diligence have discovered the same evidence twenty years ago while the father was alive and in a position probably to refute said evidence upon which it is now sought to reverse the former decisions. This plainly is not fair. It is not just and is in violation of the plain principles of law heretofore cited.

We respectfully urge that the judgment of the District Court be sustained.

Dated, San Francisco,
December 20, 1920.

Respectfully submitted,

JOSEPH P. FALLON,
Attorney for Appellee.